JURISDICTION OVER EXTRATERRITORIAL ANTITRUST VIOLATIONS—PATHS THROUGH THE GREAT GRIMPEN MIRE

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" 'That is the Great Grimpen Mire,' said he. . . . 'It is an awful place.' "[1]

I. INTRODUCTION

Judges[2] and lawyers[3] have devoted time to the subject of extraterritorial violations of statutes proscribing private restrictions on freedom of commerce for more than half a century, but the matter is still very far from being resolved in a satisfactory manner. While this essay deals primarily with the issue of jurisdiction over actions outside the United States, the jurisdictional arguments are conditioned by the background of complex legal puzzles and policy conflicts in the general field of antitrust.

Although the case law in the international area does not reflect the turmoil to the same extent that domestic cases do, there is considerable upheaval in the field of antitrust, which often makes it difficult to tell exactly (or approximately) what the law is.[4] Even in that rare case where there is no dispute over the facts, a court will often be confronted with a difficult legal question.

The nature of the transactions attacked in international antitrust suits further complicates the task of a court. For the most part these transactions will be "multistate" or "transnational" in character,[5] so that considerations of comity, international politics, enforceability and international economics, which seldom, if ever, enter into a purely domestic antitrust case, become highly significant.

As a result of the multistate nature of the transactions, there is likely to be a conflict between two or more national policies which cannot easily be reconciled. While slavery and piracy are universally condemned, cartels

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1 *The Hound of the Baskervilles* in 2 A. DOYLE, THE ANNOTATED SHERLOCK HOLMES 3, 47 (W. Baring-Gould ed. 1967).

2 *E.g.*, American Banana Company v. United Fruit Company, 213 U.S. 347 (1909) (Holmes, J.).

3 *E.g.*, Hunting, *Extra-Territorial Effect of the Sherman Act*, 6 ILL. L. REV. 34 (1911).

4 *See, inter alia*, Brown Shoe Co. Inc., v. United States, 370 U.S. 294 (1962); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); Fortner Enterprises, Inc. v. United States Steel Corp. 394 U.S. 495 (1969). "There is little doubt that now the antitrust laws are characterized by ambiguity as well as flexibility." ANTITRUST POLICY—ECONOMICS AND LAW ix (S. Berki ed. 1966).

5 An example of an international antitrust case which presents no significant "multistate" or "transnational" aspects is *United States v. Jos. Schlitz Brewing Company*, 253 F. Supp. 129 (N.D. Cal. 1966), *aff'd per curiam* 385 U.S. 37 (1966).

are illegal per se in the United States,[6] illegal if unregistered or if guilty of misuse of power in France,[7] and often not only legal but able to use the law to compel competitors of the cartels to join up in Belgium.[8]

Thus, the field is full of potential pitfalls; and there are no certain methods, it will be argued, given the present state of knowledge the present nationalistic character of the world, and the varying national attitudes toward antitrust, for laying down simple and definite rules regarding the extent of our antitrust jurisdiction abroad. In other words, the burden of this article is that one cannot have a highway through the great Grimpen Mire of international antitrust jurisdiction. One must be content with seeking relatively safe paths through it.

The process of claim to apply our antitrust laws to conduct outside our national boundaries is considered in detail in an Appendix. The text of the article first considers a list of policy preferences for antitrust jurisdiction abroad. Approaches taken to the subject in the past and a number of alternative approaches which could be taken in the future are then discussed. The final section attempts to draw conclusions of a general nature.

II. A Policy for Foreign Antitrust Jurisdiction

A. *No Attempt to Catch All "Violators"*

An attempt to condemn every activity in the world which, measured by American antitrust standards, would violate our law is neither a workable goal nor a wise policy. The Antitrust Division of the Justice Department has never had sufficient funds to attempt this "dragnet" approach in domestic antitrust; it seems wholly improbable that it will ever have the money to pay for a worldwide version of that approach. Furthermore, it might well be impossible to hire enough qualified personnel, even given limitless funds, to carry out the investigatory work necessary to bring the actions. Quite apart from questions of feasibility, the spectacle of the American Government engaging in a worldwide crusade to free the world of trade restraints would be likely to have the unfortunate appearance of an imperialistic scheme to dominate world markets. The basic rules of our policy must, therefore, include the rule that we shall be selective in the bringing of actions.

B. *Preference for Attacking per se Violations*

Those activities which have been condemned by the courts as illegal per se should be the prime target of foreign antitrust actions. There are

[6] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).

[7] Int'l Law Ass'n, Rept. of 51st Conf. 442 (1965).

[8] *Id.* at 439-41.

several reasons for this approach. First, extraterritorial application of trade regulations involves the courts in an aggregation of delicate policy judgments. There is no reason to complicate the judicial task by requiring that the court make an assessment of the reasonableness of a restraint in the context of the vast international economic realm, if the alternative of the simpler per se approach is available. Second, the per se rules are based on a judgment that the activities they condemn are wholly lacking in redeeming productive importance. They are deemed unlawful per se because they are unjustifiable. This being the case, condemnation of foreign per se violations runs very little risk of destroying beneficial effects of the restraints imposed by the defendants, whereas an attack on violations which are not unreasonable per se carries with it a danger that the good consequences will be carried away with the bad. Third, the trend of decided cases in antitrust shows that the Justice Department has attacked foreign per se violations in large numbers and has not devoted its attentions to foreign "rule of reason" cases.[9] This long-term trend, this "judgment of quiescent years," is not to be set aside as a policy basis except for substantial reasons.

C. *Probability of Detriment to the American Economy*

As shall be argued later, the "effects" test for jurisdiction, while often a useful touchstone, is not completely satisfactory as a policy instrument for separating activities which ought to be condemned from those which should be left alone. In the place of the effects test, the use of a test which looks to the "probability of detriment to the American economy" is proposed. This test would produce a more reasonable basis for differentiating the two categories of cases.

1. Scope of the Restraint

The greater the percentage of participants in the market bound by the restraint, the greater the number of nations covered by the restraint, the greater the percentage of the commerce in the relevant market covered by the restraint, the longer the time covered by the restraint, the more likely it is that the restraint will result in a substantial detriment to American commerce.

2. Nature of the Commerce Restrained

The greater the importance of the commerce in question to the American economy, in terms of the significance to our domestic economy of for-

[9] *See* United States v. Sisal Sales Corporation, 274 U.S. 268 (1927) (intentionally acquired monopoly); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (cartel); United States v. Imperial Chemical Industries, 100 F. Supp. 504 (S.D.N.Y. 1951) (market division); United States v. The Watchmakers of Switzerland Information Center Inc., 1963 TRADE CAS. ¶ 70,600 at 77,414 (S.D.N.Y. 1962) (price fixing, group boycott).

eign commerce in the products, the greater the probability of a detriment to our economy. For example, a restraint on the production of widgets in the mythical nation of Acrimonia will be of concern to the United States if the United States imports or exports substantial numbers of widgets from or to Acrimonia, but will be much less of a problem if corporations in the United States produce widgets at full capacity and sell all their widgets in the United States, and consumers in the United States buy all of their widgets from domestic producers. The United States would similarly be uninterested in the restraint if domestic consumers have no need for widgets.

D. *Least Interference with Foreign Interests Compatible with Safeguarding Our Interests*

This is an important policy goal, but one hard to state in exact terms. "Our interests" broadly defined include exclusive American interests in forbidding private restrictions on foreign and domestic trade, in increasing and preserving competition in the American markets both within and without the United States, and in increasing the effectiveness of our wealth process. Foreign interests include preservation of a certain economic way of life, promotion of their local wealth processes, and a general interest in being left alone by other nations in regard to what are believed to be domestic matters. Wherever we can implement our policy in such a way as to cause the least possible interference with what foreigners consider to be "their" problems, we should do so. But this is a counsel of perfection; ad hoc balancing may have to be resorted to in individual cases where interests are competing.

E. *Furtherance of Inclusive Interests*

Any policy should seek to further exclusive interests in the United States, but it should also seek to further inclusive interests of all participants in the wealth process worldwide. These inclusive interests comprehend, *inter alia*, amicable relationships in matters of trade among the nation-state participants (international trade will be the loser if nation A attempts to apply its antitrust laws to nation B's domestic industry in such a manner as to reconstruct completely the industry of B, and B retaliates by placing high tariffs on products imported from A), maximum worldwide production of goods and services (the strongest possible world wealth process), and the economic development of nations currently unable to realize their productive potential.

III. Past Decisions and Present Alternatives

A. *Past Decisions*

1. American Banana

American Banana Company v. United Fruit Company[10] was the first significant international Sherman Act case. Plaintiff and defendant were both American corporations. The former alleged that, at the instigation of the latter, Costa Rican officials had seized plaintiff's Panamanian banana plantation. After the seizure a Costa Rican court in an *ex parte* proceeding declared the plantation to be the property of a citizen of Costa Rica. The latter individual then sold the property in question to defendant's agents. Both the circuit court and circuit court of appeals held that no cause of action under the Sherman Act had been stated upon these facts. The Supreme Court agreed, and, in an opinion by Mr. Justice Holmes, indulged in a bit of judicial overkill. First, the Court said, plaintiff could not recover because the Sherman Act does not apply to acts done within the territory of a foreign sovereign.[11] Second, plaintiff could not recover because a seizure of one's land by a foreign sovereign is an "act of state" which cannot give rise to a right to recover in tort.[12] Finally, plaintiff could not recover because a plaintiff in tort is vested only with those rights which the local law of the place of the wrong gives him and does not possess any rights that he might have had if the tort had occurred in the forum state.[13]

By this decision, the Supreme Court appears to have foreclosed extraterritorial application of the Sherman Act. In view of *American Banana's* importance, it is a remarkably insubstantial opinion. Justice Holmes, apparently feeling that the complaint was unworthy of serious consideration,[14] wrote a beautiful piece of legal mumbo jumbo which hardly deals with the issue presented by the case.

The opinion begins by discussing the exceptions to the rule that law is applicable only within the area governed by the lawgiver. Then it states flatly: "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done" and recites the policy basis of the rule:

> For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust but would be an interfer-

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[10] American Banana Company v. United Fruit Company, 213 U.S. 347 (1909).

[11] *Id.* at 357.

[12] *Id.* at 357-58.

[13] *Id.*

[14] ". . . plaintiff's case depends on several rather startling propositions." *Id.* at 355.

"Further reasons might be given why this complaint should not be upheld, but we have said enough to dispose of it. . . ." *Id.* at 359.

> ence with the authority of another sovereign, contrary to the comity of nations, which the other state concerned might justly resent.[15]

Justice Holmes then attempted to conjure up a conflict of laws where none existed. There is no real difficulty in applying American law to the parties in this situation even though the events took place abroad. No citizen of Costa Rica would have been cast in judgment or imprisoned if the Sherman Act complaint had been upheld. The actions of the Costa Rican government acting through its army and courts would not have been undone. No adverse effect on Costa Rica's economy was apparent, unless the judgment against United Fruit had been so enormous that it crippled the company financially, which seems quite unlikely.

Nor would there have been any hardship on the parties. United Fruit was and is an American corporation of some prominence; unquestionably, it was aware of the Sherman Act. The complaint alleged knowing and willful monopolization and predatory practices. To compare United Fruit to an unlettered foreigner acting abroad, then being sued in tort for violation of American statutes because he unwittingly entered the United States is merely ludicrous.

Finally, the United States has a vital interest in the preservation of competition in its domestic trade in bananas; and, where American business cuts the throat of competing American business, it would seriously undermine this interest to grant immunity to the throat-cutter solely because he did his cutting abroad.

Justice Holmes' view of the "act of state" doctrine appears unnecessarily broad. Essentially all that happened in *American Banana* was the seizure of the property of a foreigner, the adjudication that the property belonged to a citizen of the forum state, and the sale of the property to a second foreigner of the same nationality as the first. There was no expropriation, nationalization or taking by eminent domain. No apparent benefit to the government seizing the property resulted, because the cost of the seizure and the court proceedings must have been borne, at least in part, by Costa Rica. As the citizen who recovered the property was allowed to sell it to a foreigner, no governmental policy to promote local ownership of realty was served. The action differs little from an ordinary land dispute in which the disputed land is seized by the public authority and awarded to one of the disputants. According to the *Restatement of Foreign Relations Law*:

> An "act of state" . . . involves the public interests of a state as a state, as distinct from its interest in providing the means of adjudicating disputes or claims that arise within its territory. . . . A judgment of a court may be an act of state. Usually it is not, because it involves the interests of private

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[15] *Id.* at 356.

> litigants or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to its public interests.[16]

American Banana looks much more like a private dispute than a matter of the state's public interests.

Justice Holmes' third line of defense—the "vested rights" doctrine—is a legal dogma which was never universally accepted and a dogma which history has demonstrated to be utterly inadequate.[17]

2. The Retreat from American Banana

The first signs of a retreat from the threefold prohibition against foreign application of the antitrust statute came in 1911. The landmark *American Tobacco* case[18] applied the Sherman Act to a market division contract which restrained American exports and imports, even though the agreement was executed in the United Kingdom[19] and may well have been valid and enforceable there. A strict territorial principle[20] would have required the court to determine that the agreement was in violation of British as well as American law in order to hold it invalid, but nowhere in the opinion does the Supreme Court make such a determination. In a criminal case decided at the same term of court, one Daily had allegedly obtained money under false pretenses from the State of Michigan, but performed the acts constituting the false pretenses in the State of Illinois. He was ordered released from custody on habeas corpus by the federal District Court on the ground that he had not committed a crime under Michigan law. The Supreme Court, speaking through Justice Holmes, held that Michigan could apply its criminal law extraterritorially:

> . . . the usage of the civilized world would warrant Michigan in punishing him [Daily], although he had never set foot in Michigan until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.[21]

Unlike the acts in *American Banana*, the acts of defendant in *Daily* were illegal under the law of the place where they were committed as well as under the law of the forum. In spite of this distinction, however, the

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[16] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 41, Comment *d* (1965).

[17] A EHRENZWEIG, CONFLICTS IN A NUTSHELL § 6-3 (2d ed. 1970); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 145 (1971); A. EHRENZWIEG, PRIVATE INTERNATIONAL LAW § 24 (1967); D. CAVERS, THE CHOICE OF LAW PROCESS 30-32 (1965); Brown v. Church of the Holy Name of Jesus, —— R. I. ——, 252 A.2d 176 (1969).

[18] United States v. American Tobacco Company, 221 U.S. 106 (1911).

[19] *Id.* at 172.

[20] RESTATEMENT OF THE CONFLICT OF LAWS, §§ 311 ff. (1934); 2 J. BEALE, CONFLICT OF LAWS §§ 311.1 ff. (1935).

[21] Strassheim v. Daily, 221 U.S. 280, 284-85 (1911).

case squarely endorses the principle that acts in a foreign jurisdiction, done with the intent to produce harmful conseqences and actually producing such consequences within the jurisdiction seeking to apply its law, form a basis for the application of that law to the actor. Justice Holmes is thus an architect of the very siege engines used to bring down the fortress he erected in *American Banana.*

Two years after these cases the Supreme Court decided the case of *United States v. Pacific & Arctic Co.*[22] The government claimed that a conspiracy in violation of the Sherman and Interstate Commerce Acts had been entered into in regard to the shipping of freight from the continental United States to the territory of Alaska. In reversing judgment on demurrer for the defendants, Justice McKenna endorsed the principle that the antitrust laws did not apply extraterritorially, at least to the conduct of foreigners, but relied on actions taken by the defendants within the United States to hold that the demurrer should not have been sustained. While the holding of *Pacific & Arctic*, that the fact that part of the activities in violation of the Sherman Act take place outside the United States does not prevent application of the Act to the activities as a whole, is clear enough, it is much less clear exactly why the court thought it had jurisdiction. The opinion makes reference to the conspiracy's control over transportation in the United States, apparently an allusion to the fact that the conspiracy had effects within the United States. But it also refers to activities within the United States and apparently renounces any notion that foreign citizens or corporations operating abroad could be prosecuted or sued under the Sherman Act. Perhaps the case means that there are two conditions precedent to the application of the antitrust laws to conspiracies or contracts outside our borders: (1) there must be effects on American commerce, (2) part of the proscribed activity must take place within the United States.

Consistent with this interpretation of *Pacific & Arctic* is a 1917 case involving similar facts. In a private action under the Sherman Act plaintiff alleged that defendants combined in restraint of trade by offering, in effect, lower prices to American companies which shipped goods to South Africa exclusively on their shiplines than were offered to companies which did not patronize their shiplines exclusively. Although the plaintiff prevailed in the trial court, the circuit court of appeals reversed. In reversing the judgment of the circuit court of appeals, the Supreme Court, again speaking through Justice McKenna, noted that, although the combination was formed abroad, it was put into operation in the United States and it affected the foreign commerce of the United States.[23] Thus it appeared that where an effect on American commerce could be shown and where overt

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[22] 228 U.S. 87 (1913).

[23] Thomsen v. Cayser, 243 U.S. 66, 88 (1917).

acts in furtherance of the conspiracy took place in the United States, the Sherman Act could be applied.[24]

The *Sisal Sales* case,[25] decided ten years after the preceding case, relied on the domestic nature of the conspiracy, on overt acts committed within the United States, and on intent to affect American commerce. The court also rejected the "act of state" defense raised by defendants on the basis of discriminatory foreign legislation apparently passed for their benefit, thus pointing the way to the current narrow exception for acts of state and inconsistent foreign law in the antitrust field.[26]

A somewhat later case suggested another basis for jurisdiction in the antitrust field. In the well-known *Branch*[27] case, petitioner was the proprietor of a correspondence school of the fly-by-night variety. The Federal Trade Commission issued a cease and desist order forbidding petitioner from continuing to represent directly or indirectly that his school was an accredited institution and that the so-called diplomas and degrees he awarded were recognized by any governmental agency or any reputable college or university. Petitioner sought to have the order set aside on the ground that the FTC lacked jurisdiction, contending that the only persons likely to be deceived were residents of Latin America. The Seventh Circuit, speaking through Judge (later Justice) Minton rejected petitioner's argument on the familiar grounds that: 1) there were substantial activities connected with the practice within the United States (it was conceived, initiated, concocted and launched on its way in the United States), 2) the effects of the practice were within the United States and the FTC had jurisdiction to protect commerce within the United States, and 3) foreign activity of an American citizen could be controlled by the United States. But the Court also said:

> The United States may protect its commerce from the wrongful acts of its own citizens who remain, as petitioner did, within the United States *and whose wrongful acts are prejudicial to other citizens of the United States who are in competition for that commerce.*[28]

Here the court seems to be employing the "passive personality" principle, basing its jurisdiction in part at least on harm caused from (or in) foreign countries to American citizens. Although the passive personality principle has not played a significant role in jurisdiction in this field, its use in the past makes it an obvious candidate as an alternative to more commonly used bases.[29]

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[24] *See also* Ford v. United States, 273 U.S. 593 (1927).

[25] United States v. Sisal Sales Corporation, 274 U.S. 268 (1927).

[26] *Id.* at 274-76.

[27] Branch v. Federal Trade Commission, 141 F.2d 31 (7th Cir. 1944).

[28] *Id.* at 35 (emphasis supplied).

[29] *See* discussion Section III, C, 1, *supra.*

3. Alcoa and the Modern Era

It is not surprising that the decision which is perhaps the most significant single Sherman Act decision of the last fifty years is also the leading case on the extraterritorial application of the antitrust laws. In the *Alcoa*[30] case the Court of Appeals for the Second Circuit (acting in place of the Supreme Court, which was unable to decide the case for lack of a quorum) first determined that the American defendant, Alcoa, was not a party to a Swiss cartel of aluminum producers, known as the Alliance, which comprised aluminum producers from Canada, Germany, France, Britain, and Switzerland.[31] After reaching this conclusion, the court considered the Alliance and the two agreements implementing its purposes. In the course of this portion of the opinion the court discussed the rationale of the antitrust laws in great detail, and the discussion deserves extended quotation.

The court first stated that, although the question was one of American statutory and constitutional law, a construction of the law could not be carried out without regard to the conflict of laws.

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. . . . On the other hand, it is settled law . . . that *any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.*
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> There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affect exports. Almost any limitation of the supply of goods in Europe . . . may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them. . . . for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. Where both conditions are satisfied the situation certainly falls within such decisions as . . . *Pacific & Arctic . . . Thomsen* v. *Cayser* . . . and *Sisal Sales. . . . It is true that in those cases the person held liable had sent agents into the United States to perform part of the agreements; but an agent is merely an animate means of executing his principal's purposes, and for the purposes of this case, he does not differ from an inanimate means.* . . .
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> Both agreements [implementing the purposes of the Alliance] would clearly have been unlawful had they been made within the United States, and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them.[32]

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[30] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[31] *Id.* at 439-43.

[32] *Id.* at 443-44 (emphasis supplied).

The court then reviewed the figures relating to the subject of imports, and, rather than reaching a conclusion as to whether the agreements affected imports, decided to

> . . . dispose of the matter . . . upon the assumption that, although the shareholders intended to restrict imports, it does not appear whether in fact they did so. Upon our hypothesis the plaintiff would therefore fail, if it carried the burden of proof upon this issue as upon others. We think, however, that after the intent to affect imports was proved, the burden of proof shifted to 'Limited' [Aluminium Limited, Alcoa's former sister corporation[33] in Canada]. In the first place a depressant upon production which applies generally may be assumed, ceteris paribus, to distribute its effect evenly upon all markets. Again, when the parties took the trouble specifically to make the depressant apply to a given market, there is reason to suppose that they expected that it would have some effect, which it could have only by lessening what would otherwise have been imported. If the motive they introduced was over-balanced in all instances by motives which induced the shareholders to import, if the United States market became so attractive that the royalties did not count at all and their expectations were in fact defeated, they to whom the facts were more accessible than to the plaintiff ought to prove it, for a prima facie case had been made.[34]

Without saying so, Judge Hand thus effected a major overhaul of the law of antitrust jurisdiction. Previous cases had relied on the fact that actions took place within the United States rather than on the less concrete effects test alone. Furthermore, the existence abroad of a conspiracy which was intended to affect American commerce was all the plaintiff need prove to win, unless the defendant could perform the very difficult task of proving a negative, in a field where disproving effects is a complex task because of the myriad viariables of the international economy.

Subsequent decisions have followed Judge Hand's lead in applying the *Alcoa* rationale to other situations. Philips, a Dutch corporation, was held to have violated the Sherman Act in the *General Electric* case[35] because of the intended effects its activities had on American commerce in lamps. Imperial Chemical Industries, a British firm, was held to have violated the law because of effects on American commerce in man-made fabrics and other products.[36] A number of Swiss firms were held to have affected the American watchmaking industry.[37]

The most significant recent development in the area, after the *Alcoa* revolution, has been the narrowing of the act of state defense in antitrust

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[33] For a definition of "brother-sister corporation," *see* 26 U.S.C. § 1563(a)(2) (1944).

[34] United States v. Aluminum Company of America, 148 F.2d 416, 444-45 (2d Cir. 1945).

[35] United States v. General Electric Co., 82 F. Supp. 753 (D. N.J. 1949).

[36] United States v. Imperial Chemical Industries, 100 F. Supp. 504 (S.D.N.Y. 1951).

[37] United States v. The Watchmakers of Switzerland Information Center, Inc., 1963 TRADE CAS. ¶ 70,600, at 77,414 (S.D.N.Y. 1962).

cases involving foreign conduct. In the *Continental Ore* case[38] a private plaintiff alleged that its Canadian business had been destroyed by the activity of the defendants' wholly-owned Canadian subsidiary. The district court rejected plaintiff's offer to prove this allegation on the ground that, since the subsidiary acted as exclusive purchasing agent of the Canadian government's Metals Controller, the matter was a transaction wholly in the hands of the Canadian government and whether or not plaintiff was permitted to sell his material to a customer in Canada was a matter wholly within the control of the Canadian Government.[39] The Court of Appeals affirmed, but the Supreme Court reversed, distinguishing the *American Banana* case:

> [Plaintiff does] not question the validity of any action taken by the Canadian Government or by its Metals Controller. Nor is there . . . any question of the liability of the Canadian government's agent. . . . What . . . [plaintiff does] contend is that [defendants] are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental [plaintiff] from the Canadian market. As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and [defendants] are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.
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> [Defendants] are afforded no defense from the fact that Electro Met of Canada [defendants' wholly-owned Canadian subsidiary] in carrying out the bare act of purchasing vanadium from [defendants] rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements in an unlawful scheme.[40]

One commentator observed that the Continental Ore case indicates that parties are ill-advised to rely upon permissive foreign law to justify restraints on United States commerce.[41]

Similarly, in the protracted and celebrated *Swiss Watchmakers* litigation, many of the restraints complained of by the United States were encouraged by Swiss statutes, devised by Swiss trade associations in which the government of Switzerland participated, and actively supported and heartily approved by the Swiss Government.[42] In a brief submitted by the Swiss Confederation as amicus curiae, the following argument was made:

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[38] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

[39] *Id.* at 703.

[40] *Id.* at 706-07.

[41] Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 295 (1963). *But see* Occidental Petroleum Corp. v. Buttes Gas and Oil Co., —— F. Supp. —— (C.D. Cal. 1971).

[42] United States v. Watchmakers of Switzerland Information Center, Inc., 1963 TRADE CAS. ¶ 70,600, at 77,414 (S.D.N.Y. 1962).

> This case is of utmost importance to the Swiss Confederation. The attempt is here being made to apply the antitrust laws of the United States to hold illegal action taken (a) in Switzerland, (b) at the behest and with the encouragement of the Swiss Confederation and in conformity with Swiss law, (c) by the Swiss watch industry, (d) which is both government regulated and affected with a public interest. . . . Not only does the present action constitute a direct attack upon the legislation and policy of the Swiss Confederation; it further seeks to regulate conditions in Switzerland and to limit the control which the Swiss Confederation may exercise over its own watch industry. . . . It has always been held that the antitrust laws do not apply to acts done in the territory of a foreign sovereign in furtherance of that sovereign's law and policy. . . .[43]

When at length a decision was reached in the *Watchmakers* case, Judge Cashin answered the arguments as follows:

> The defendants claim that the court should not assume jurisdiction over activities because American antitrust laws cannot be applied to acts of sovereign governments.
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> If, of course, the defendants' activities had been required by Swiss law, this court could do nothing. An American court would have under such circumstances no right to condemn the governmental activity of another sovereign nation. In the present case, however, the defendants' activities were not required by the law of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were recognized as facts of economic and industrial life by that nation's government. Nonetheless, the fact that the Swiss Government may as a practical matter approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from foreign governmental mandate. In the absence of direct foreign governmental action compelling the defendants' activities, a United States court may exercise its jurisdiction as to acts and contracts abroad, if, as in the case at bar, such acts and contracts have a substantial and material effect upon our foreign and domestic commerce. . . .[44]

B. *Critique of Past Theories of Jurisdiction*

1. Territoriality (Strict)

American Banana and its progeny all rely on some variety of the strict territoriality principle for jurisdiction in antitrust cases. While the *American Banana* principle that the Sherman Act stopped at the water's edge was quickly abandoned, subsequent decisions have generally relied on the fact that "constituent elements of the offense" or "overt acts in furtherance of the conspiracy" had been committed in the United States, as the basis for applying the law.

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[43] Reprinted in part in INT'L LAW ASS'N, *supra* note 7, at 575. The author of the brief is apparently Professor Willis Reese.

[44] United States v. Watchmakers of Switzerland Information Center, Inc., 1963 TRADE CAS. ¶ 70,600, at 77,414, 77,456-57.

Under this theory antitrust violations for which an American court will give relief must occur wholly or in part within United States territory. Though this theory is, of course, not the only currently acceptable theory in the courts, a number of justifications in policy and in law can be advanced in its favor. The territoriality principle has long been thought to promote certainty.[45] It facilitates proof of violations, because documents and witnesses relating to the overt acts within the United States will generally be available to the court, while it might be difficult or impossible for the court to compel attendance of witnesses or production of documents in foreign countries.[46] The danger of affronting foreign sovereigns is greatly reduced, because activities wholly within foreign countries will not be the subject of actions in America. Further, it may be asserted that since it is difficult to carry out a conspiracy to restrain American trade without committing some acts within the United States, extraterritorial application of the law is not really necessary to the protection of American commerce. Finally, it has been argued that American courts cannot apply the antitrust laws except in a strictly territorial manner without violating international law.[47]

Assuming that the territoriality principle does promote certainty, it may be asked whether this is a situation in which we wish to increase predictability. Ordinarily, certainty in antitrust statutes is desirable because businessmen are thereby enabled to know which activities are allowed and which are proscribed. But the certainty promoted by the strict territorial principle is a spatial or geographic certainty. A businessman is put on notice that he can engage in proscribed activities so long as he and his fellow actors do no acts within the United States. The activity promoted by this variety of certainty is not condemned by the law because it is deemed to be consistent with public policy. Since it is not anticompetitive it may be presumed useful, i.e., leading toward the production of more goods and services. The activity promoted by the latter variety of certainty is likely to be quite anticompetitive and to lead to detrimental economic effects by discouraging American exports or increasing the price of imports. It carries no presumption of utility.

Although administration of the law would be simplified if proof of violations were made easier (since a court would not have to enter into the sticky problems of obtaining information abroad and of establishing the existence of wholly foreign conspiracies), the ease of administration ought to be weighed against the danger that activities abroad will result in dam-

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[45] *See, e.g.*, Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L. Q. 156, 165, 167 (1930).

[46] *See* the protests made by foreign sovereigns against attempts to compel production of documents collected in INT'L LAW ASS'N, *supra* n. 7 at 565 ff.

[47] Haight, *Internatonal Law and Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639, 642-43 (1954).

age to the foreign and domestic commerce of the United States. The former would certainly appear to carry less weight.

Similarly, while we must be ever mindful of the legitimate interests of foreigners, it is highly unrealistic to regard all attempts to apply our law to foreign conduct as a one-way street. We are not meddling in their affairs while they are leaving us strictly alone. As one authority has stated:

> When Switzerland or Canada or any other country employs its governmental processes to protect business entrepreneurs in activities which impair the healthy functioning of community process within the United States, it is interfering with the internal domestic affairs of the United States fully as much as the United States may be interfering with the internal affairs of such other country in applying its Anti-trust laws to the injury-causing activities. . . . In an interdependent world interference by States in each other's community processes, including economic affairs, is inescapable. The question is by what principles and procedures such interference can be moderated and made reciprocally tolerable in the maintenance and expansion of an international economy.[48]

The *Alcoa* case by itself should be sufficient refutation of the argument that acts within the United States will be a necessary concomitant of any serious violations of the antitrust laws affecting the United States. If the aluminum industry can be cartelized in such a fashion, then others can be similarly organized. And it seems reasonable to expect that the largest (and thus potentially the most dangerous) anticompetitive organizations will be the most careful to avoid any activity here.

The charge that an application of the antitrust laws to violations occurring in their entirety outside the United States violates international law is indeed a serious one and, if correct, would be by itself a sufficient reason for not applying the law. But it appears that the vast weight of authority and, more importantly, the practice of states, indicate that such an application of the antitrust law is perfectly legal under the law of nations.[49]

Territoriality, then, appears to be too narrow a basis for jurisdiction, because it allows violations seriously affecting our commerce to escape sanctions. The courts ought to seek a more comprehensive basis.

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[48] INT'L LAW ASS'N, *supra* note 7, at 331 (remarks of Professor M. S. McDougal).

[49] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, § 18; P. JESSUP, TRANSNATIONAL LAW 64 (1956); Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legar Order*, 32 TEMP. L.Q. 295, 300-02 (1959); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1150-52 (1956); Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law*, 63 COLUM. L. REV. 1441, 1478-79; W. COOK THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 10, 14-15, 72, 77; INT'L LAW ASS'N, *supra* note 7, at 325-26 (remarks of Professor C. J. Olmstead). *See* the French cases applying trademark laws extraterritorially: *Syndicat du Commerce des vins de Champagne c. Ackerman Laurance* (Cour d'Appel d'Angers, 1891) 19 Clunet 1144; Brown v. Wagner (Cour d'Appel de Paris, 1911) 38 Clunet 1192 (semble).

2. Effects

The test of *Alcoa* and subsequent cases for applying the laws of the United States has been stated as follows: "Do these acts or contracts have a substantial effect upon our foreign commerce. . .?"[50] The effects principle thus enables American courts which can obtain personal jurisdiction over the relevant persons and corporations to apply our antitrust statutes to anticompetive conduct wherever committed, if that conduct produces significant detrimental consequences within the United States and was intended to produce such consequences. The danger of unnecessary interference with the activities of foreign persons and foreign sovereigns is reduced by the requirements that the detriment be a substantial one[51] and that it be intentional.[52]

It may be thought, therefore, that the effects principle provides a method whereby the United States can reach all important violations of the law, without offending foreigners by attempting to apply its law to those situations entirely or chiefly concerned with commerce having at most an incidental effect on American commerce. But it is doubtful that such a principle in fact represents the sought-for golden mean.

First, as Professor Katzenbach has observed, intended and substantial effect on American commerce is not, without more, sufficient information on which to base a judgment that the United States is the nation primarily interested in the activity causing the effect. ". . . [A]nything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States."[53] The *Swiss Watchmakers* case provides a simple example. The effects on American watchmaking are patent, but the need of the Swiss Confederation to regulate a major source of national income may be of greater relative interest to Switzerland than is the need to have one minor industry in the United States remain competitive.[54]

Professor Falk has expressed dissatisfaction with the effects test as being unpersuasive and conceptualistic:

> It is important that the state asserting jurisdiction involve the most persuasive available rationale so that its assertion is made to appear as reasonable and hence as acceptable as possible . . . horizontal order, with its emphasis upon reciprocity, depends heavily upon States convincing each other that they are acting reasonably in regard to the delimitation of legal competence.

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[50] W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 31 (1958).

[51] United States v. Watchmakers of Switzerland Information Center Inc., 1963 TRADE CAS. ¶ 70,600, at 77,414 (S.D.N.Y. 1962); Hale and Hale, *Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas*, 31 TEX. L. REV. 493, 532 (1952).

[52] United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945).

[53] Katzenbach, *Conflicts on an Unruly Horse*, *supra* note 49, at 1150.

[54] *See* text accompanying note 41-43, *supra.*

> The United States has not always offered the most persuasive available justification for its recent controversial assertions of legal competence. This has been a consequence of seeking to explain the modern scope of competence by exclusive resort to an extended conception of the Territorial Principle. For example, the efforts to vindicate the extension of antitrust regulation have concentrated upon locating a predominantly foreign event *within* the United States by indicating its effect upon the domestic economy; there is an effort to treat complex cartel arrangements as an analogy to the man standing in A and shooting into B.[55]

The effects test, as its other name—"objective territoriality"—indicates, is merely an attempt to dress up the old territoriality principle in modern garb, and, like the strict territoriality principle, does not recognize the international or transnational nature of the events in question.

Professor Jaeniche of Germany has denounced the effects principle as "wholly unsuitable" and argued that if it were to become universally accepted it could form the basis of an unlimited extraterritorial jurisdiction since "by skillful drafting of a penal statute" a nation "can make any effect of conduct abroad a constituent element of the crime."[56]

Mr. Haight emphasizes the uncertainty which the effects principle produces:

> "[Basing] jurisdiction on effects is to open floodgates and multiply conflicts. No lawyer can advise his client in one country regarding the effects business transactions may have in other countries that may invoke the laws of other countries. Where a transaction is to operate in another country then, of course, the laws of that country are examined and complied with. But to try to appraise effects all over the world is just impossible."[57]

The "substantial economic effect" requirement may turn out to be an insubstantial safeguard against sliding down the slippery slope described above. The Supreme Court, in a domestic Commerce Clause case, has stated that a substantial effect can be implied, not from one actor's behavior, but from a consideration of that intriguing question "What if everybody did that?":

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.[58]

If courts are willing to uphold domestic regulation by multiplication of effects, it is not unreasonable to expect them to uphold application of trade regulation to commerce abroad by the same means.

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[55] Falk, *International Jurisdiction*, *supra* note 49 at 304-06.

[56] INT'L LAW ASS'N, *supra* note 7, at 319.

[57] *Id.* at 342.

[58] Wickard v. Filburn, 317 U.S. 111, 127-28 (1942). *See also* Katzenbach v. McClung, 379 U.S. 294 (1964).

The "intent test" is likewise a weak reed. The Second Circuit was willing to presume effects from intent, providing the defendant did not prove himself an economic magician by demonstrating lack of effects.[59] Courts have been willing to reverse the process by implying an intent to violate the law from effects. It is settled that a specific intent to restrain trade or to build a monopoly is not a necessary part of the proof in an antitrust case. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. . . . To require a greater showing would cripple the Act."[60]

The effects test, then, seems unsatisfactory as a means of resolving the problem of when to apply the American antitrust laws to foreign activity.

3. Abnegation of Jurisdiction Based on Foreign Law

A long-standing rule of American antitrust law, a rule which has its roots in the *American Banana* decision, is that acts compelled by foreign sovereigns cannot form the basis for jurisdiction under the antitrust laws. The "foreign sovereign activity" exception to jurisdiction could be applied, as one commentator has pointed out, in three possible situations: "(1) foreign law or executive authority requires or directs the acts or contracts in question; (2) foreign law or executive authority acquiesces in such acts or contracts; or (3) foreign law does not prohibit such acts or contracts."[61] However, the current practice of courts, as the commentator notes, is to deny jurisdiction only in the case of acts falling within the first category. From *Sisal States*[62] to the *Swiss Watchmakers*[63] the cases repeat the formula that, unless the conduct is compelled by foreign law, it cannot escape the antitrust laws, if it would otherwise be violative of them.[64]

This exception to the general rule is certainly justified by common sense, as far as it goes. There is manifestly an element of unfairness in forcing a businessman to make the choice between Scylla and Charybdis, with one state declaring mandatory that which another state forbids. Furthermore, since we allow our antitrust laws to yield state policies in the form of fair trade legislation, it seems self-righteous and overreaching for us to apply the law despite specific statutes in foreign countries compelling the behavior we condemn. The act of state doctrine would appear to cover this situation since an act by which the state compels behavior of a certain kind would appear to be one "by which that state has exercised its jurisdic-

[59] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1965).

[60] United States v. Griffith, 334 U.S. 100, 105 (1948). *See also* United States v. Masonite Corporation, 316 U.S. 265, 275 (1942).

[61] FUGATE, FOREIGN COMMERCE, *supra* n. 50, at 50.

[62] United States v. Sisal Sales Corporation, 274 U.S. 268 (1927).

[63] United States v. Watchmakers of Switzerland Information Center Inc., 1963 TRADE CAS. ¶ 70,600, at 77,414 (S.D.N.Y. 1962).

[64] Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

tion to give effect to its public interests."[65] The problem appears, then, to be that this exception to jurisdiction is acceptable so far as it goes; but it seems doubtful whether it goes far enough.

As stated above, the policy bases for the exception appear to be two in number: (1) avoidance of unfairness to defendants by forcing them to choose between two illegal courses of conduct and (2) respect for the policy of foreign sovereigns by not questioning the propriety of their compelling a particular course of conduct. In many cases, the present doctrine provides less than satisfactory results in terms of both policy bases.

As to the protection of defendants from inconsistent laws, there is a twofold problem. First, the foreign statute or administrative regulation may be one that is seldom enforced (like Mississippi's late prohibition statute) or one whose violation would entail a slight penalty, for example, a fine which had been sizeable at the time the statute was enacted, but which, through time and inflation, had become nominal.[66] In other words, the present doctrine does not distinguish between compelling foreign violations which would subject the defendant to serious criminal penalties and those which might be subsumed under the category of costs of doing business. Second, the "legality" of a course of action prescribed by American law may be of slight comfort to defendant if compelling that course of action results in the defendant's ruin. This latter point may be illustrated by a hypothetical case suggested by the famous Imperial Chemical Industries litigation.[67]

The Acme Corporation is organized under the laws of Acrimonia and has its principal place of business there. Acme has entered into a number of contracts in Acrimonia which have the effect of restraining the export of beer into America. The contracts are perfectly legal under Acrimonian law, and effects intentionally inflicted on American commerce are the only basis of jurisdiction. If Acme is ordered to break all these contracts by an American court, it will be liable in damages, under Acrimonian law, to all the Acrimonian corporations, although it almost surely has a perfect legal right to refuse to perform the contracts, for any reason, if it is willing to pay damages.

As concerns the need for respecting the foreign sovereign's declared policy as expressed in laws compelling a certain type of conduct, the *Restatement of Foreign Relations Law's* comments on the act of state doctrine are noteworthy:

> An "act of state" . . . involves the public interests of a state as a

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[65] RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, § 41. *See* Comments *c* and *d* to § 41.

[66] *Cf.* the wrongful death damage "ceiling" involved in Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966).

[67] *Supra* note 9. *See* O. HOLMES, THE COMMON LAW 289 ff. (1881).

> state as distinguished from its interest in providing the means of adjudicating claims that arise within its territory. In determining whether an act is an act of state, the branch or agency of the government—executive, judicial, or legislative—that performed the act is not as important as the nature of the action taken.[68]

Thus, while it may be said that a legislative or executive statement of principle in the form of requirement regarding conduct is likely to be an act of state,[69] an act of state is not necessarily limited to such a statement. The determination of what constitutes a fundamental policy interest of a state, like the determination of what constitutes an act of state, involves more than a mere determination whether certain conduct is or is not required by law.

This point can be made in a more concrete manner by a hypothetical case suggested in part by the protracted *Swiss Watchmakers*[70] litigation. Acrimonia is vitally dependent for foreign exchange on its export of electronic mousetraps. The Acrimonian mousetrap industry was once severely damaged by a price war among the various Acrimonian firms, which occured simultaneously with a sharp upturn in the cat birth rate. In order to prevent the recurrence of such a situation, the government of Acrimonia took a number of steps. However, Acrimonia is not a believer in socialism; and government officials did not wish to impede entrepreneurs any further than absolutely necessary in the national interest. So the officials institute a program of government subsidies to "cooperative and public-spirited" mousetrap manufacturers, "cooperative and public-spirited" being defined as "adhering to reasonable business methods and affiliated with a national cartel" which in turn allocates markets, sets output limitations, and fixes minimum prices. There is, however, no "compulsion" to join the cartel in the sense of a law or regulation requiring membership, nor is there a criminal penalty attached to not being "public-spirited and cooperative."

It is difficult to see why Acrimonia's public policy is not as directly involved in this sort of scheme as it would be if Acrimonia required anticompetitive behavior by law. That is to say, it is incorrect to assume that every vital state interest will be embodied in the form of a law forbidding or compelling certain behavior, although it may be correct to assume that a state has a vital interest in encouraging all behavior it makes compulsory and in discouraging all behavior it outlaws.

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[68] *Supra,* note 16.

[69] *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

[70] Watchmakers of Switzerland Information Center Inc., 1963 TRADE CAS. ¶ 70,600, at 77,414 (S.D.N.Y. 1962).

C. *Alternative Theories of Jurisdiction*

1. Passive Personality

Although the "passive personality" test was recognized as at least an alternative basis for jurisdiction in the *Branch* case,[71] it offers little promise as a method for resolving the dilemma of a nation wishing to apply sanctions to conduct abroad but unwilling to rely on any of the more traditional and (hopefully) discredited theories discussed above. In the first place, passive personality is merely the effects test applied to nationals rather than to the nation or the nation's commerce, and would appear, therefore, to be subject to all the objections which have been raised to the effects test. Secondly, authoritative writers have rejected it as a basis of jurisdiction. The *Restatement of Foreign Relations Law* states: "A state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals."[72]

2. Nationality

Although some authorities profess a belief that there is scant precedent for the use of nationality as a basis for antitrust jurisdiction,[73] there is virtually universal acceptance of the proposition that the "absent citizen is subject to the state's legislative commands"[74] and that, consequently, a state may impose sanctions on the conduct of a citizen, no matter where the citizen commits the acts comprising the conduct.[75] Like the principle of strict territoriality, the nationality principle has the virtue of being unlikely to offend foreign sovereigns. But it also shares the fault of the nationality principle, namely, that forbidden conduct by foreign nationals committed outside the United States can not be touched. Not only would all aliens be free to restrain United States commerce, but the United States would not even have the satisfaction of knowing that, although monopoly profits were being made, the Amercan firms were sharing in them. Neither nationality nor passive personality offers any more satisfactory results than territoriality or effects.

3. Conflict of Laws—"Private Law Perspectives on a Public Law Problem"

One very actively developing area of international jurisdiction in re-

[71] Branch v. Federal Trade Commission, 141 F.2d 31 (7th Cir. 1944).

[72] *Supra* note 16, § 30(2).

[73] Trautman, *The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation*, 22 OHIO ST. L.J. 586, 604-08 (1961).

[74] GOODRICH, CONFLICT OF LAWS, § 73 (4th ed. E. Scoles 1964).

[75] Blackmer v. United States, 284 U.S. 421, 436-38 (1932); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, § 30(1)(a); RESTATEMENT OF CONFLICT OF LAWS, § 47(2) (1934). *Cf.* Joyce v. Director of Public Prosecutions, [1946] A. C. 347 (House of Lords).

cent years has been the field of conflict of laws or "private international law." The reaction against one of Harvard's greatest pooh-bahs, Professor Joseph Beale, symbolized by the works of Cook[76] and Lorenzen,[77] has developed into a search for new methods to ascertain the correct law to apply to a set of facts involving more than one state.[78] While it is not suggested that the theories taken over from private law will provide instant solutions for the complex public law problems involved, they offer more promise than any of the traditional doctrines in providing an adequate theoretical basis for dealing with the problems.[79]

In this essay those conflict of law theories are dealt with which appear to offer promise in aiding the solution of the problems in question. Other theories, rejected because they are considered of little or no help in this context, however useful they may be elsewhere, are discussed in the Appendix.

(a) *Professor Falk's "Reasonableness" Approach*

Professor Falk advocates an abandonment of the effects test and the substitution of a more flexible approach:

> Rather than attempt to prove that the event should be treated as if it took place inside United States territory it would seem more convincing to use the more flexible approach expressed in § 42(1) of the Second Restatement of the Conflict of Laws (Tentative Draft No. 3).
>
> § 42 Definition of Jurisdiction
>
> (1) A state may create or affect legal interests whenever its contacts with a person, thing or occurrence are sufficient to make such action reasonable.[80]

The virtues of this approach are that it "does not isolate a single factor and make its existence or non-existence crucial to the claim of jurisdiction" but instead evaluates the whole situation.[81] "Reasonableness" implies self-delimitation of competence and this self-delimitation "should seek to take maximum account of the existence of other states and give effect to a mutually satisfactory standard of reciprocity."[82]

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[76] COOK, LOGICAL AND LEGAL BASES, *supra* note 49.

[77] E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947).

[78] Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

[79] A modern conflict of laws approach to this problem has, to the best of my knowledge, never been taken by an American court. Courts have, however, used this approach in similar circumstances in Jones Act cases. *See* Lauritzen v. Larsen, 345 U.S. 571 (1953). A number of writers have discussed the uses of conflict of laws in the area of extraterritorial application of antitrust laws. *See e.g.* Katzenbach, *Conflicts on an Unruly Horse*, *supra* n. 49; Trautman, *The Role of Conflicts Thinking*, *supra* note 73; Note, *Limitations on Federal Judicial Power*, *supra* note 49; Comment, *Extraterritorial Application of the Antitrust Laws: A Conflict of Laws Approach*, 70 YALE L.J. 259 (1960).

[80] Falk, *International Jurisdiction*, *supra* note 49, at 304-06.

[81] *Id.*

[82] *Id.* at 320.

Professor Falk's proposal is notable both for its rejection of traditional antitrust jurisdictional theories and its modern approach to conflict of laws. It appears to set the court, looking for a way through the mire, on the right path; and its only real drawback would appear to be that it does not provide sufficient guideposts.

(b) *Professor Baxter's "Comparative Impairment"*

Professor William Baxter provides what appears to be a useful method of resolving conflicts in the area. First, he points out

> ". . . in choice-of-law cases there are two distinct types of governmental objectives, internal and external. The internal objectives are those underlying each state's resolution of conflicting private interests. These objectives inhere in a case even if the fact situation is wholly localized to a single state. . . . External objectives are introduced when a transaction affects persons identified with different states. They are the objectives of each state to make effective, in all situations involving persons as to whom it has responsibility for legal ordering, that resolution of contending private interests the state has made for local purposes. In each real conflicts case the external objective of one state must be subordinated. The choice problem posed is that of allocating spheres of lawmaking control.
>
> [O]ne can articulate and apply a normative principle to determine which external objective to subordinate. The principle is to subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact, by subordination in cases like the one at hand.
>
> Implicit in the principle is the assertion that a court can and should be beyond a determination whether a state has *any* governmental interest in the application of its internal law—that a court can and should determine which state's internal objective will be least impaired by subordination in cases like the one before it.[83]

He warns that the task he proposes to set to court is not an easy one:

> The inquiries that must precede application of this principle are often difficult. Judicial attempts to apply the principle often would be accompanied by inadequately articulated opinions and sometimes would be demonstrably erroneous. But such failings attend judicial application of many legal criteria; and even if it is assumed that error is more common in the application of general than of precise criteria, it does not follow that all such criteria ought to be abandoned.[84]

And he answers the criticism that the task would be too much for courts:

> The objection that courts are not equipped to discover the facts upon which resolution must turn is equally applicable to a very large percentage of our judge-made rules of law.[85]

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[83] Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. I, 17-18 (1963).

[84] *Id.* at 19.

[85] *Id.* at 21.

Comparative impairment would mean that the court would have to make some difficult decisions. But it would provide a means for resolving the perplexing problem of the clash between a strong foreign state interest in restrictive practices and the American interest in keeping trade free.

(c) *Theories for Resolving Multistate Problems*

In their formidable casebook,[86] Professors Von Mehren and Trautman make a number of worthwhile suggestions concerning methods for resolution of multistate problems. First, they point out that a conflict of laws is not simply a struggle between discordant internal policies of separate states. An interstate or multistate case involves domestic policies, to be sure, but it involves others as well:

> A functional analysis calls for examination both of the policy balances struck in the domestic-law rules and of any multijurisdictional policies that the jurisdiction may have, that is to say, general policies deriving from a community's position as a single unit of a larger community.[87]

A court balancing the interests to determine if American antitrust law applies should, it would seem, take into the equation not only the domestic policies of the United States and other concerned jurisdictions but also their general policies, such as those enumerated as aforementioned in Section II, E.

Secondly, they point out methods for resolving the question of which jurisdictions interest in a matter predominates.

> . . . [A]nalysis of the domestic-law policies of two concerned jurisdictions may suggest that even though the respective domestic-law policies are of relatively equal weight, the concern of jurisdiction X, in light of its relation to a multistate transaction far outweights that of jurisdiction Y. . . . even if the individual concerns of the several jurisdictions are of relatively equal weight, there frequently occurs what might be termed an aggregation of concerns in one jurisdiction: X may be a concerned jurisdiction on more than one basis, as compared with jurisdiction Y, which is concerned on only one basis.[88]

This would appear to resolve problems of contracts made in a state strongly opposed to antitrust, which are meant to and have most of their important anticompetitive consequences in the United States.

There is another basis for solving such problems, however:

> Frequently conflicts between the regulating rules of two concerned jurisdictions can rationally be resolved by examining the strength of the do-

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[86] A. VON MEHREN AND D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965).
[87] *Id.* at 216.
[88] *Id.* at 341-42.

> mestic law and multijurisdictional policies that lead each concerned jurisdiction to select its regulating rule.[89]

A state with a regressing anticompetitive policy will be entitled to have that policy given less weight by an American court than a state which steadfastly adheres to a form of neo-mercantilism.

Narrowly defined policies of one jurisdiction are entitled to greater weight in the equation than more sweeping policies.[90] Thus a rule of per se illegality for price-fixing should prevail over some more general rule aimed at fostering cartelization.

Finally, there is a situation presumed by Von Mehren and Trautman to be rare in conflicts cases generally, but which seems to appear, all too frequently in antitrust cases. "When the concerned jurisdictions have conflicting views, when no one jurisdiction is predominantly concerned, and when analysis of the strength of each jurisdiction's policies discloses no clear basis for choice," the situation where "one concerned jurisdiction's rule would prohibit what another's permits" should be resolved in favor of upholding the transaction.[91] This policy in favor of upholding multistate transactions is qualified, however, by a subsequent statement that in cases of such "irreducible conflicts" the forum may be justified in applying its own law.[92] On the whole, however, Von Mehren and Trautman appear to favor a policy which, when applied to antitrust, would tip the balance against application of American antitrust law when it would otherwise be in equipoise.

D. *Choice-Influencing Considerations*

Professor Leflar offers five principles which he believes ought to influence the court in its choice of law.[93] The first of these, "predictability," is not of much aid, since universal application of the antitrust laws would appear to offer as much predictability as universal non-application.[94] The second, "maintenance of interstate and international order," which appears to mean "a minimum of mutual interference with claims or aspirations to sovereignty," likewise is neutral.[95] As pointed out earlier,[96] mutual interference can result from applying antitrust laws or from allowing persons in a state's jurisdiction to violate the foreign law with impunity. "Simplification of the judicial task"[97] could go either way as well; a rule that for-

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[89] *Id.* at 376.

[90] *Id.* at 377-78.

[91] *Id.* at 406-07.

[92] *Id.* at 407.

[93] Leflar, *Conflicts Law*, *supra* note 78.

[94] *Id.* at 1586.

[95] *Id.*

[96] *See* text accompanying note 48, *supra.*

[97] Leflar, *Conflicts Law*, *supra* note 78 at 1586-87.

eign law shall always apply simplifies the judicial task about as well as a rule directing that American law shall always be applied. However, Professor Leflar's last two considerations, "advancement of the forum's governmental interests"[98] and "application of the better rule of law,"[99] appear to favor the extension of the antitrust laws to foreign facts. Unless there is little or no chance that the violation will have any consequences here, the governmental interests of the United States will be advanced by applying our laws. The American antitrust laws are surely the "better law" both in terms of our own view of things and in view of a foreign trend away from governmental disinterest in competition and from governmental support of cartelization.

IV. Conclusion—The Method Applied

It is contended that the courts of the United States should discontinue talk about "territoriality" and "effects" and frankly administer the antitrust laws on the basis of a balancing of exclusive and inclusive interests, whether that balancing be called "reasonableness," "comparative impairment," or resolution of "multistate problems." Indications of how this method ought to be applied have been given earlier, in the policy statement[100] and in the discussion of the various methods. The conclusion will consider some of the more specific applications of this method.

A. *Protection of Foreign Business Community*

Where compliance with our antitrust policy would violate no foreign law but would have a significant effect on the business community of a foreign nation (*e.g.*, by causing the insolvency of a major competitor in that community), the governmental interest of the foreign nation is entitled to greater weight than it would be entitled to if only slight economic dislocation resulted from compliance with our law.[101] Perhaps "the protection of the foreign business community" should only be entitled to consideration insofar as the remedy is concerned, so that our decrees will not interfere with existing contracts which are due to expire shortly but will forbid the renewal or renegotiation of such contracts if they appear to constitute a danger to American freedom of commerce.

B. *Consideration of Vested Rights*

Where the antitrust violation is embodied in contract, it is entitled to less consideration than where it is a property right or a business organization on which people have been relying for a number of years. The for-

98 *Id.* at 1587.

99 *Id.* at 1587-88.

100 *See* Section II, *supra.*

101 K. Brewster, Antitrust and American Business Abroad 303 (1958).

eign government has a greater interest in preserving the rights of its property owners and shareholders than it has in upholding their freedom of contract.[102]

C. *Similarity of Economic Interests*

Where a nation has similar economic interests to those of the United States, we should much more readily apply our law than in those situations where our interests are dissimilar. An example of similar economic interests is a situation where a cartel in country X limits production, thus reducing American imports of the product of the cartel but at the same time reduces X's exports thereof. As a matter of first impression, one would expect X to be unhappy over limitations on its exports and to be willing to lend a hand in breaking up the cartel or at least willing to have the United States break up the cartel.[103]

There can be little doubt that much remains to be done in this field. But if courts will accept the guidelines set down by conflicts writers and weigh the competing interests carefully, they will be able to reach more intellectually honest opinions than use of the outmoded economic effects tests allows them to do.

APPENDIX—THE PROCESS OF CLAIM[104]

1. Scope of Competence Demanded

A. *Objectives*

The principal objective of the forum would appear to be the resolution of the controversy by application of a prescription to foreign parties or to foreign activities of a domestic party.

B. *Situations*

(1) Physical location of the parties allegedly acting in violation of the trade regulations.

(i) Domicil (or residence) or nationality. So far as individuals are concerned, their physical location for jurisdictional purposes includes the place which the law decrees to be their homes (domicil) and the nation to which the law determines they owe allegiance (nationality).

(ii) Place of incorporation. The physical location of a corporation includes the place in which it is incorporated, since the law attaching consequences to the conduct of that corporation will in large measure be the law of that place.[105]

(iii) Place where business is done. The corporation, partnership, proprietorship, or individual may be located, for jurisdictional purposes, in any place in which it (he) does a substantial amount of business.[106]

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[102] *Id.* at 303-04.

[103] *Id.* at 304.

[104] The categories in this section are derived from the work of Professors McDougal and Lasswell. *See* particularly MCDOUGAL, LASSWELL AND VLASIC, LAW AND PUBLIC ORDER IN SPACE 646-748 (1963) *and* LASSWELL AND KAPLAN, POWER AND SOCIETY, *passim* (1950).

[105] *See* the venue provisions in 28 U.S.C. § 1391(c).

[106] *Id.*

(iv) Principal place of business—center of business activity. Though this category overlaps in many cases with (ii) and in all cases with (iii) *supra*, it has independent significance because it is the prime location of the business entity in terms of actual conduct rather than merely in terms of legal status.[107]

(v) Place where the parties are served with process. The place of service of process assumes importance in those instances in which the main link, the crucial link, between the forum and the parties is the fact that process has been served upon them from that forum.[108] Certainly there is a difference between service on the company's president in his office within the district, service on an officer of the company while flying over the district in an airliner which does not land within that district,[109] and service in a foreign country upon the company's officers there.

(2) Locus of events where the actions allegedly violating the antitrust law took place.

(i) Place(s) of contracting (or conspiring). While modern law places less emphasis on this fact than the orthodoxy of a few years ago did, it is still considered relevant.[110]

(ii) Place(s) of performance. It is also considered significant.[111]

(iii) Place(s) where the most important events relevant to the making of the contract or its performance took place (significant contacts). Recent writing in the area of conflict of laws emphasizes the fact that the place where the agreement is entered into or is to be performed may not necessarily be the place with the most vital interests in the contract. The significant contacts theory looks to the abovementioned locations, but to other places as well if they are relevant in determining which state has the most significant contacts.[112]

(iv) Place(s) where the most important impact of the activity is felt. Significant contacts are generally thought to be questions relating to the formalities preceding the making of the contract and the actual making and performance thereof. But if the contract is entered into in state Y between citizens of state X and is performed in state Z with the result that it becomes impossible for persons in state A to purchase an item, then it is obvious that state A, though lacking "significant contacts" with the contract itself, may be vitally interested therein because of the effect of that contract.

C. *Base Values*

There are four basic forms of wealth belonging to aliens within the forum state which are vulnerable to attack by fine or private treble damage suit. These are real property, personal (tangible) property, intangible property (held in the name of the alien), and debts owed by the alien's domestic debtors to the alien (garnishment).[113]

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[107] *Cf.* the treatment of a corporation whose principal place of business is within a state as a citizen of that state, 28 U.S.C. § 1332(c).

[108] Fed. R. Civ. P. 4(d)(1) allows service of process upon a person within a district, no matter how transitory his stay there. Rule 4(i) provides for service of process abroad, where authorized by statute.

[109] Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).

[110] *Compare* RESTATEMENT OF CONFLICT OF LAWS § 311 (1934) *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

[111] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 110, § 188 2(c); H. GOODRICH, CONFLICT OF LAWS § 114 (4th ed. E. Scoles 1964).

[112] *Id.*

[113] *See* Harris v. Balk, 198 U.S. 215 (1905).

D. *Strategies*

(1) Service of process *in personam*. This would include not only service upon the person sought to be sued, but service upon an officer of a corporation and service upon an agent of a person. "Personal service" refers to service of process upon a person; there is no general requirement that the service be made by handing the process to him personally.[114]

(2) Attachment of property. While one cannot always serve process upon a person within (or without) the district, there is in many cases a strategy available as a supplement to personal jurisdiction. This is jurisdiction *quasi in rem* based on the person's ownership of property within the district.[115]

E. *Outcomes*

Outcomes can be divided into two categories: (1) the decisions reached, and (2) the sanctions imposed.

(1) Decisions

(i) Dismissal for lack of jurisdiction. This may be a decision based on lack of jurisdiction over the person (failure to serve process correctly, no method provided whereby defendant can be properly served) or lack of jurisdiction over the subject matter (no showing that the conduct alleged comes within the purview of any applicable statute).

(ii) Application of foreign law. For a variety of reasons (*e.g.*, promotion of mutual trust, belief that foreign law is the better law, belief that foreign interests and contacts in the case outweigh domestic ones), the court may "apply" foreign law to the case in question, *i.e.*, it may decide the case in accordance with those principles of law prevalent in the foreign country.

(iii) Application of domestic law. If the court decides that it has jurisdiction over the parties and subject matter in controversy and that the law to be applied is not foreign law, then it will apply domestic law to the case, *i.e.*, it will treat the case as if it were one arising under its own antitrust law. (This is not to say, however, that it treats the case exactly in the same manner as it would treat a wholly domestic case.)

(2) Sanctions. Assuming that, upon application of domestic (or conceivably, foreign) law to the case, a violation of the antitrust laws has been decreed, there are three basic sanctions available:

(i) Damages. This sanction, used in the United States in private suits, serves the purpose of restoring to the plaintiff that which he lost through defendant's tortious conduct. Since the damages are thrice the amount of actual damage proved, the sanction also serves as punishment for the wrongdoer.

(ii) Injunction. By this sanction, the evil perpetrated is prevented from continuing.

(iii) Divestiture. Where it is impossible to stop violations of the laws so long as a combination of business enterprises persists, the court will order the combination dissolved.[116]

2. The Process of Claim

A. *Participants*

(1) Parties brought before the court. This category includes those governments, corporations, and individuals who are the actual plaintiffs and defendants in the action at bar.

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[114] Fed. R. Civ. P. 4(d).

[115] *See* Pennington v. Fourth Nat'l Bank of Cincinnati, Ohio, 243 U.S. 269 (1917) (Brandeis, J.).

[116] United States v. E. I. Dupont de Nemours & Co., 366 U.S. 316 (1961).

(2) Individuals and corporations directly affected by the outcome though not parties to the action. This would include companies having contracts with the defendants which the defendants could no longer perform because prohibited from doing so by the decree in the antitrust suit.[117]

(3) Individuals and corporations whose behavior is affected indirectly by the action of the court. This category includes businessmen who are made wary by the decree of concluding agreements similar to those struck down and are encouraged to enter into agreements like those sustained.

(4) Foreign sovereigns. In a large number of antitrust cases, foreign sovereigns have felt their interests to be so affected by the pending litigation as to take an active part in it, by filing protests with the State Department,[118] or by filing briefs in the cases as *amici curiae*.[119]

B. *Objectives*

Objectives of the nation seeking to apply its antitrust law generally fit within one or more of the following categories.

(1) Restoration of competitive conditions in the forum's foreign (and domestic) trade.

(2) Deterrence of further violations of the law by the parties to the suit and deterrence of future violations in general.

(3) Reparation of damages to individuals and corporations caused by violations.

(4) Punishment of offenders.

(5) Establishment of standards of conduct so that other participants in the marketplace can carry on a profitable business without running afoul of the law.

C. *Situations*

(1) Persons outside. The Court will generally be dealing with persons (legal and actual) who exist outside the boundaries of the forum state.

(2) Contracts, conspiracies, and other behavior outside. The court will also be involved with the nature and provisions of contracts, conspiracies, and courses of dealing in nations outside the forum.

D. *Base Values*

The base values sought to be affected include the corporate licenses, rights under contracts and other intangible assets of the foreign defendants. They also include corporate and personal tangible assets. In a more general manner the base values affected comprehend the policies[120] and programs[121] of a foreign sovereign.

E. *Strategies*

(1) Diplomatic. The diplomatic strategy may be employed to negotiate treaties with antitrust provisions therein (such as the EEC treaty)[122] or to discourage a nation from allowing monopolists from operating within its borders.

(2) Ideological. The use of publicity is often effective in mobilizing

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117 *Cf.* the British Nylon Spinners litigation. United States v. Imperial Chemical Industries, 105 F. Supp. 215 (S.D.N.Y. 1952); British Nylon Spinners v. Imperial Chemical Industries [1952] ALL E.R. 780 (Ct. App.).

118 INT'L LAW ASS'N, *supra* note 7, at 565.

119 *Id.* at 575-76.

120 As used here, a "policy" is a general course of action by which a government seeks to further an interest.

121 As used here, a "program" is a specific means of furthering one or more governmental interests.

122 INT'L LAW ASS'N, *supra* note 7, at 473-76.

public opinion against monopolies at home; hardly a week goes by without an advertisement in the *New York Times* by an antitrust defendant attempting to counter the bad publicity caused by the bringing of the case. Such a strategy could be mobilized in foreign contexts as well.

(3) Economic. In a context such as antitrust, the use of the economic strategy naturally suggests itself. An example would be government procurement regulations which gave special consideration to the bids of small competitors.

F. *Outcomes*

Outcomes can be evaluated with regard to all values.

3. Interest Sought to be Protected

A. *Participants*

Participants can be classified on a descending scale of direct involvement of their interests:

(1) Parties to the litigation.

(i) Those directly affected by the outcome of the litigation (competitors of defendants, for example).

(ii) Those whose interests are remotely affected by the outcome (*e.g.*, consumers).

B. *Objectives*

(1) Protection of individuals involved. The antitrust laws, while perhaps not primarily concerned with the protection of individual competitors as such, can be invoked by them for the protection of their interests against anticompetitive behavior by others.[123]

(2) Protection of those directly involved in the activity concerned. As presently interpreted, antitrust laws are used to protect smaller competitors, as a class, in an industry from the accumulation of too much power in the hands of large competitors.[124]

(3) Protection of specialized classes within society. Certain groups within society, most notably consumers, are sought to be protected by antitrust statutes.[125]

(4) Protection of value processes. The antitrust statutes have as their goal the protection of a competitive economy and the benefits derived by consumers from the efficient use of resources and the pluralistic distribution of power which such an economy provides.

C. *Situations*

Situations comprehend ont only the international economy but also

(1) Regional economies (*e.g.*, the EEC).

(2) National economies.

(3) Subdivisions of national economies (along sectional or product lines).

(4) Subdivisions of sectional[126] or product lines.[127]

D. *Base Values*

The base values to be included range from property of citizens of the forum state (United States) to the policies and programs of the forum state.

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[123] Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[124] Brown Shoe Co. Inc. v. United States, 370 U.S. 294 (1962).

[125] *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965).

[126] United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665 (1964).

[127] Brown Shoe Co. Inc. v. United States, 370 U.S. 294 (1962).

E. *Strategies*

The economic strategies are sought to be protected by producing (or preserving) an unfettered economy. Such an economy is generally considered to be necessary for the continued effectiveness of military, diplomatic, and ideological strategies.

F. *Outcomes*

Outcomes include

(1) The consequentiality of the change inflicted by events taking place outside the forum state.

(2) The magnitude of the impact of such events on the various value processes affected.

(3) The intensity of that impact.

G. *Effects*

Effects should include the long-range consequences of impacts upon value processes.

4. The Counterclaim to the Competence Asserted

A. Claim that the decision-maker is not sufficiently connected with the controversy or the interests at stake to apply policy. This may amount to more than an assertion of lack of subject matter jurisdiction. It can include the claim that international law would be violated by such an application of the law by the decison-maker.

B. Claim that although the decision-maker is sufficiently connected with the events to apply its law, another decison-maker (most likely the counterclaimant) is more appropriate to decide the issue by virtue of a more significant connection with the parties, contracts, etc.' involved.

C. Claim that defendant is immune from competence to apply. An obvious example of this immunity claim is the assertion that defendant is partly or entirely owned by the government of a foreign sovereign and is therefore entitled to sovereign immunity.

APPENDIX—THE NEW ORTHODOXY OF THE SECOND RESTATEMENT

One can hardly enter the area of the Conflict of Laws without paying some attention to the Second Restatement. Since antitrust regulation partakes of the character of contract law (contracts, conspiracies, and courses of dealing) and of torts (inasmuch as a private party can seek damages under the statute for civil wrongs done him by the violation of the statute), it is necessary to pay attention to the provisions of the Second Restatement in both fields.

The relevant section for ascertaining the validity of the contract is § 188. With an exception not here pertinent, the Restatement says that the governing law is that chosen by the parties, or, in the absence of an effective choice by the parties, the law of the state with which the contract has the most significant relationship. The factors to which consideration should be given in determining the state with which the contract has its most significant relationship include, but are not limited to, the place of contracting, the place of negotiation, the place of performance, the situs of the subject matter of the contract, the domicil, residence, nationality, place of incorporation and place of business of the parties, and the place under whose local law the contract will be most effective.[128]

The basic rule for torts is similar. "The local law of the state" having "the most significant relationship with the occurrence and with the parties determines

[128] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 110 §§ 186-188 (Tent. Draft No. 6, 1960).

their rights and liabilities in tort." The important contacts to be considered in determining the state of most significant relationship include "the place where the injury occurred," "the place where the conduct occurred," "the domicil, nationality, place of incorporation and place of business of the parties," and "the place where the relationship, if any, between the parties is centered." Finally, the court of the forum in determining the relative importance of the contacts "will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states."[129]

Neither of these sections appears to be of much help in advancing the cause of the United States. If parties are able to select the law governing the validity of their contracts, they will almost certainly choose the law of a nation with little or no antitrust regulation, rather than the law of the United States. In case the choice was not effective, the rules as to significant relationship would likely compel application of some law other than the United States, for the place of contracting, negotiation, performance, and so forth, will almost certainly be some nation with liberal antitrust laws. If the contract is intended to restrain trade, it will surely be most effective under the law of the nation which places the least restricions on such contracts.

The rules as to tort are only slightly better. Though the place where the injury occurred might be the United States, the place of conduct and the domicil, nationality, place of incorporation, and place of business of the actors will presumably be without the United States. Neither the "place of relationship" rule nor the discretion given the court in weighing factors in the last part of the section would appear to give the United States the right to apply its laws. Under the Second Restatement, the problem would be solved quickly and simply by denying the United States jurisdiction to deal with extraterritorial violations.

APPENDIX—PROFESSOR CURRIE'S INTEREST ANALYSIS

Perhaps the best known and at the same time the most controversial of the nonorthodox theories of conflict of laws is that associated with the name of the late Professor Brainerd Currie and usually known as "interest analysis." The general principles of "interest analysis" have been summarized as follows:[130]

> When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. . . .
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> If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

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[129] *Id.* § 145.

[130] This discussion of the thought of Professor Currie may be objected to on the grounds (1) that it is misplaced, for "Currie's theory was not devised for international conflicts cases," EHRENZWEIG, PRIVATE INTERNATIONAL LAW, *supra* note 17 at 64, and (2) that it misstates Currie's position, since he later changed his mind. *See, e.g.*, Currie, *Comment on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242-43 (1963). The first objection is unimportant, since reasoning by analogy and not wholesale application of Currie's theory to international cases is all that is sought. As for the second objection, it seems that Currie's amendments to his thought do not significantly change those aspects which are of concern in this matter.

> If the court [determines] that the forum state has no interest in the application of its policy, but the foreign state has, it should apply the foreign law.
>
> If the court [holds] that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.[131]

Because it is willing to look behind the law's "face" and because it emphasizes the interest the government has in the application of its policy, the interest analysis method possesses advantages over the simpler effects and strict territoriality theories. By stressing the relationship of the forum to the case, it provides a threshold to prevent cases with remote relationship to vital United States commerce and cases in which the United States has no interest from being heard. And by calling on the court to perform an interest analysis on the foreign law as well, it may well prevent some of the horribles detailed under the heading "Abnegation of Jurisdiction Based on Foreign Law," *supra*. Unfortunately, however, interest analysis, because of its preference for the law of the forum, does not provide a constructive method for mediating between contradictory policies. Presumably the United States will have an interest sufficient to allow it to apply its law in any case where there is a substantial probability of harm to our economy from a foreign scheme. But so long as the American interest is more than minimal, a contrary interest of a foreign nation, no matter how strong, would not be allowed to prevail over it. The situation would not differ greatly from that prevailing where the test applied is the effects tests.

APPENDIX—PROFESSOR CAVERS' PRINCIPLES OF PREFERENCE

An early critic of the old orthodoxy,[132] Professor David Cavers has recently proposed a number of principles of preference to assist courts in choosing the proper law to apply to multistate cases. Only one of these principles appears to be pertinent here.

This principle is:

> *Where the liability laws of the state of injury set a* higher *standard of conduct or of financial protection against injury than do the laws of the state where the person causing the injury has acted or had his home, the laws of the state of injury should determine the standard and the protection applicable to the case. . . .*[133]

This principle would allow the United States to apply its law whenever an "injury" was caused here by anticompetitive behavior abroad. Unfortunately, the concept of state of injury comes rather close to the language of effect; and, even assuming that an "injury" is a much more sophistocated concept than an "effect," this principle would always result in preference being given to American law, no matter how important the interest of the foreign state.

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131 B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183-84 (1963).

132 Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933).

133 CAVERS, CHOICE OF LAW PROCESS, *supra* note 17 at 139.